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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2201/2012*, **

Communication submitted by:	Aleksandr Tyvanchuk et al. (represented by counsel, Roman Kisliak)
Alleged victims:	Aleksandr Tyvanchuk and 28 others
State party:	Belarus
Date of communication:	23 February 2012 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 24 October 2012 (not issued in document form)
Date of adoption of Views:	26 March 2018
Subject matter:	Lack of fair trial
Procedural issues:	Substantiation of claims; exhaustion of domestic remedies
Substantive issues:	Competent, independent and impartial tribunal; fair trial; facts and evidence; right to appeal
Article of the Covenant:	14 (1), (2), (3) (b) and (e), (5) and (6)
Articles of the Optional Protocol:	1, 2 and 5 (2)

1. The authors of the communication are Aleksandr Tyvanchuk, Yuliya Tartsan, Aleksandr Uskhopchik, Valery Kondratenko, Oleg Pobozhny, Viktor Goldyuk, Vyacheslav Pavlov, Viktor Sheshuk, Vitaly Rybakov, Valery Gruzinsky, Vladimir Zhuravel, Sergei Bliznyuk, Igor Pasyuk, Aleksei Bannikov, Anatoly Golubkin, Vladimir Buyak, Dmitry Timchenko, Stanislav Kuchits, Yury Nikolaev, Yury Okhrimuk, Viktor Andreichikov, Aleksandr Maryakov, Viktor Demidyuk, Yury Overchuk, Anatoly Osipuk, Nikolay Lyashkevich, Vladimir Selivonets, Aleksandr Azhaev and Aleksei Chumichev,[1] nationals of Belarus. They claim that the State party has violated their rights under article 14 (1), (2),

* Adopted by the Committee at its 122nd session (12 March–6 April 2018).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Christof Heyns, Ivana Jelić, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

[1] The authors are listed in the same order as in the submission.

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(3) (b) and (e), (5) and (6) of the Covenant. The Optional Protocol entered into force for the State party on 30 September 1992. The authors are represented by counsel.

The facts as submitted by the authors

2.1 In 2002, officials at the Zapadny Bug customs checkpoint, near Brest, Belarus, carried out a comparative check of electronic databases (on the entry and exit of trucks) with the Polish Customs Service. It was found that 82 trucks that had been registered at the Vestavto customs terminal of the Zapadny Bug checkpoint had never entered Poland from Belarus, contrary to the routes indicated in the customs records. At the beginning of 2003, a criminal investigation was opened regarding the officials and mechanics of the customs terminal where the trucks had been registered. The authors were among the accused. In April 2004, the criminal case against the authors was transferred to Brest District Court, on the basis of allegations of assisting in the importation of goods into the territory of Belarus without payment of customs duties. The authors were accused of violating articles 16 (6) (aiding and abetting), 231 (2) (aiding in avoidance of customs duties) and 424 (3) (abuse of power) of the Criminal Code of Belarus.

2.2 On 14 April 2004, upon the request of the President of the Supreme Court, the criminal case was split in two (cases Nos. 02018000177 and 04018000020) and transferred to Minsk Military Court. The authors note that they unsuccessfully opposed that decision on the ground that none of them was a member of the military. On 26 October 2004 and 5 August 2005, respectively, the Military Court found the authors guilty under articles 16 (6), 231 (2) and 424 (3) of the Criminal Code, sentencing them to different prison terms and ordering the confiscation of property belonging to them. The authors submit that, during the court hearings, the Military Court repeatedly rejected their counsel's request to present witnesses of the defence, without providing any reasons. The authors filed a cassation appeal against the two decisions with the Military Panel of the Supreme Court, which upheld the decisions of Minsk Military Court on 4 March and 21 October 2005, respectively.

2.3 The authors submit that, during 2005 and 2006, they filed numerous complaints regarding the lack of an effective investigation and of a fair trial, with the President of Belarus, the Prosecutor General's Office, the Supreme Court, the Ministry of Justice and other government agencies and, as a result, a new investigation team was created by the Prosecutor General's Office to investigate the circumstances of the case. In 2007, the investigation team concluded that the authors were unaware of the criminal activity going on at the customs checkpoint, and that they had unwittingly been used by those orchestrating the crime. On 4 September 2008, the Prosecutor General requested the Supreme Court to initiate new criminal proceedings in the light of newly discovered circumstances, and to quash the decisions of Minsk Military Court. That request was rejected by the Supreme Court on 26 September 2008, which did not provide any grounds for its decision.

2.4 The authors appealed against the Supreme Court decision before the Prosecutor General's Office under the supervisory review procedure on various occasions, and complained to the President of Belarus and the country's Security Council. However, none of those authorities addressed the substance of their appeals.

2.5 On 27 February 2006, the Military Prosecutor filed a civil suit against the authors for substantial material damage arising from the breach of customs regulations. On 27 March and 25 April 2006, Moscow District Court of Brest ordered the authors to pay different sums in damages (varying from 80 million to 2 billion Belarusian roubles).[2] The authors also submit that Moscow District Court based its decision solely on the criminal court verdicts in their cases and did not address any of their arguments or objections. The authors contend that they attempted to file appeals with Brest Regional Court (on 5 May 2006) and with the Supreme Court (on 28 July 2006), but those appeals were rejected for failure to pay court fees on 6 May and 25 August 2006, respectively. According to the authors, in order to be able to pay the fees, they would have to work for 10 years without

[2] Approximately, $37,000 to $930,000.

paying rent or buying food. Their requests to waive the excessively high fees were rejected by Moscow District Court and Brest Regional Court.

The complaint

3.1 The authors claim that, despite the fact that none of them was a member of the military, their criminal cases were examined by Minsk Military Court. They also claim that the Military Court was biased and that the way in which the facts and evidence were evaluated and domestic legislation was interpreted in their cases was arbitrary. They claim that the facts outlined above disclose a violation of their rights under article 14 (1) of the Covenant.

3.2 The authors allege a violation of article 14 (1) of the Covenant, in relation to the civil proceeding regarding damages, on the grounds that Moscow District Court was biased, because the presiding judge had been recently appointed from a different district court, and because the court had based its decision solely on the criminal court verdicts in their cases and had not addressed any of their arguments or objections. They claim that the refusal of Brest Regional Court and the Supreme Court to waive the high court fees for submission of their cassation appeals amounts to a violation of article 14 (1) of the Covenant.

3.3 The authors also claim that their right to defence under article 14 (3) (b) of the Covenant has been violated, since they were not given adequate time to prepare their defence. The authors explain that, when the criminal cases were transferred from Brest to Minsk, they had to move 350 km away from home and appoint new counsels to represent them. Consequently, their lawyers had to prepare their defence in a very short period of time, which influenced the quality of their defence.[3]

3.4 The authors further claim that article 14 (1) and (3) (e) of the Covenant has been violated because Minsk Military Court refused the request of three of the authors to summon four witnesses who could have confirmed the arguments of the defence.

3.5 The authors claim a violation of article 14 (2) of the Covenant without further clarification.

3.6 The authors contend that, according to criminal procedure, cassation courts can only review first-instance court decisions on points of law. During the consideration of their cassation appeals, the Military Panel of the Supreme Court failed to proceed to a full review of their cases,[4] limiting itself to a review of the way in which the lower courts had applied the law, thus violating the authors' rights under article 14 (5) of the Covenant.

3.7 The authors claim to be victims of a violation of article 14 (6) of the Covenant. Despite the fact that the investigation initiated in 2007 had collected new exculpatory evidence and that the General Prosecutor's Office had requested the Supreme Court to reinitiate the criminal proceedings, the Court failed to quash the previous decisions and to refer the case for a new review.

State party's observations on admissibility

4. In a note verbale dated 12 November 2012, the State party challenges the admissibility of the communication under article 1 of the Optional Protocol. It notes that the communication was submitted on behalf of the authors by third parties, in particular by S.V. from Ukraine and A.K. from Poland, who are not subject to the jurisdiction of the State party. In the light of the above, the State party considers that the communication was

[3] The criminal case was transferred from Brest District Court to Minsk Military Court on 14 April 2004, and hearings in the first case took place from June to September 2004.

[4] In the cassation appeal, the authors raised issues concerning the evaluation of evidence, in particular the conclusions of the expert commission, witness statements and insufficient proof of their guilt. They claimed that the conclusion of the lower court did not correspond to the factual circumstances of the case. The Military Panel of the Supreme Court addressed all the authors' claims and found that the lower court had duly evaluated all the evidence in the case and correctly established the guilt of each of the authors. The Military Panel of the Supreme Court considered the material evidence in the case and the cassation claims. It referred to the investigation and expert conclusions, the witness statements, the lower court decision and the minutes of the lower court hearing.

registered in breach of the Optional Protocol. It has therefore discontinued proceedings regarding the present communication and would disassociate itself from any Views that might be adopted by the Committee in the case.

Lack of cooperation by the State party

5.1 The Committee notes the State party's assertion that there are no legal grounds for the consideration of the authors' communication, insofar as it was registered in violation of the provisions of the Optional Protocol, and that it will not cooperate with the Committee with regard to the Views adopted in the present communication.

5.2 The Committee recalls that article 39 (2) of the Covenant authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1 of the Optional Protocol). The Committee recalls its practice, as reflected in rule 96 (b) of its rules of procedure, that individuals may be represented by a person of their choice, provided that the representative is duly authorized. Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its Views to the State party and to the individual (art. 5 (1) and (4)). It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a communication and in the expression of its Views.[5] It is up to the Committee to determine whether a case should be registered. The Committee observes that, by refusing the right of an individual to be represented, by failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring outright that it will not accept the Committee's determination of the admissibility and merits of the communication, the State party has violated its obligations under article 1 of the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. In the absence of objections from the State party concerning the exhaustion of domestic remedies by the authors, the Committee considers that the requirements of article 5 (2) of the Optional Protocol have been met.

6.3 The Committee notes that the authors have not clarified how the presumption of innocence under article 14 (2) of the Covenant has been violated and finds this part of the claim inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes the authors' complaint that their rights under article 14 (3) (b) were violated because Minsk Military Court was located 350 km from their place of residence and because they had to appoint new lawyers, which did not leave them enough time to prepare their defence. In that regard, the Committee notes from the material before it that the authors have not sufficiently substantiated that claim and finds it inadmissible under article 2 of the Optional Protocol.

6.5 The Committee notes the authors' allegation that article 14 (5) of the Covenant was violated because the Military Panel of the Supreme Court, acting as a cassation instance, reviewed their appeals on matters of law only, and did not carry out a substantive review of

[5] See, for example, *Levinov v. Belarus* (CCPR/C/105/D/1867/2009, 1936, 1975, 1977-1981, 2010/2010), para. 8.2; and *Piandiong et al. v. Philippines* (CCPR/C/70/D/869/1999), para. 5.1.

the facts and evidence relating to the case. It also notes the authors' allegation that, according to domestic law, the cassation instance can only address the first-instance court decision on points of law. In that regard, the Committee recalls that article 14 (5) imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[6] In the present case, the Committee observes that the authors do not specify which substantive claims they were not able to raise before the Military Panel of the Supreme Court or which claims raised in their appeal were not addressed by the Supreme Court. The Committee also observes that the Supreme Court did engage in an evaluation of the facts and evidence and did not limit the review to the points of law. In the absence of specific claims from the authors, the Committee finds their allegations under article 14 (5) of the Covenant to be of a general nature and insufficiently substantiated. It considers this part of the complaint inadmissible under article 2 of the Optional Protocol.

6.6 The Committee notes the allegations by the authors that the refusal of the Supreme Court to reopen the proceedings on the basis of newly discovered circumstances violated their rights under article 14 (6) of the Covenant. The authors claim that the Court failed to provide a justification for such a refusal. From the Supreme Court decision in question, the Committee notes, however, the following reasons for the decision reached by the Court. The Supreme Court found that the Prosecutor General's conclusion about the newly discovered circumstances was based on testimonies of seven persons convicted in case No. 02018000177, who altered their testimonies during the investigation in a new criminal case (No. 05018000044). The Court found that the guilt of the authors was established on the basis of evidence collected in case No. 02018000177, which was studied by the first-instance court. The Supreme Court concluded that a change in the testimonies of persons convicted by a court decision (which later became final) did not in itself indicate the establishment of new circumstances leading to the reopening of a criminal case. The Committee recalls that it is generally for a State party's courts to evaluate the facts and the evidence, or the application of domestic legislation, in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, or that the court failed in its duty to maintain independence and impartiality.[7] In the absence of other specific allegations from the authors to indicate that the Supreme Court ruling was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligations concerning independence and impartiality, the Committee finds the claim under article 14 (6) of the Covenant insufficiently substantiated for the purpose of admissibility under article 2 of the Optional Protocol.

6.7 The Committee notes the authors' claim that the trial by Minsk Military Court raises issues under article 14 (1) of the Covenant since none of them were military personnel. The Committee also notes that the authors' further claims under article 14 (1), concerning the proceedings before Minsk Military Court and the civil proceedings before Moscow District Court in Brest in the suit for damages, as well the claim under article 14 (3) (e), are closely related to the proceedings in the Military Court. In the absence of the State party's arguments regarding admissibility of those claims, the Committee finds them admissible and proceeds with its consideration of the merits.

6.8 The Committee also notes the authors' claim that the excessive court fees in civil proceedings and the refusal of the cassation courts to waive the fees prevented them from accessing the cassation courts and violated article 14 (1) of the Covenant. The Committee notes that the relevant documents on file concern the appeals submitted against the civil court decision dated 25 April 2006 by only one author, Mr. Tyvanchuk. There is no information on file that the other authors appealed against the civil court decision in their case. The Committee thus finds this claim under article 14 (1) of the Covenant admissible in respect of Mr. Tyvanchuk and proceeds with its consideration of the merits. The

[6] See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 48.

[7] See, inter alia, *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; and *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6.

Committee finds this claim insufficiently substantiated and inadmissible under article 2 of the Optional Protocol for the other authors.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the authors' allegation that, on 26 October 2004 and 5 August 2005, they were tried and found guilty under the Criminal Code by Minsk Military Court, following the decision by the President of the Supreme Court to transmit their case to a military court, even though none of them were military personnel. While the Covenant does not explicitly prohibit the trial of civilians in military courts, it does not provide for it either. The Committee notes that the trial of civilians in military courts raises serious problems as far as the equitable, impartial and independent administration of justice is concerned.[8] Therefore, in order to guarantee the right to a fair trial, State parties have in general an obligation to take all measures necessary to prohibit the trial of civilians in military courts.[9] In the present case, the State party has not contested the fact that the authors were civilian personnel. The Committee concludes that the trial and sentencing of the authors by a military court violated article 14 (1) of the Covenant.

7.3 In view of this finding and because of their inseparable link to the trial by Minsk Military Court, the Committee decides not to examine separately the authors' remaining claims under articles 14 (1) and 14 (3) (e) of the Covenant in relation to the proceedings before the Court and their claim under article 14 (1) of the Covenant in relation to the civil proceedings before Moscow District Court in Brest.

7.4 The Committee notes the claim of Mr. Tyvanchuk that the excessive court fees rendered impossible consideration of his cassation appeal dated 5 May 2006 by Brest Regional Court against the civil court decision, thus denying him access to a court in violation of article 14 (1) of the Covenant. The Committee also notes that the author was supposed to pay the court fees, which amounted to 5 per cent of the damage he was supposed to pay in accordance with his criminal sentence. The amount of the damage was Rbl 904,773,450,[10] and the court fees, accordingly, where calculated at Rbl 45,238,675.[11] The Committee further notes that the author submitted evidence of his salary to the Court and that his monthly income amounted to Rbl 297,600.[12] The author also pointed out that his property was confiscated in accordance with the sentence of Minsk Military Court. The Committee notes that Moscow District Court in Brest, acting as a cassation court, and the Supreme Court, acting as a supervisory court, refused the author's request to waive the court fees and rejected his appeals because of his failure to pay the fees, without considering the author's arguments that the fees were excessive and impossible to pay. The Committee observes that the courts have, by law, the power to waive the fees. By summarily rejecting the author's request to waive the court fees without considering the individual circumstances of his case, they denied the author access to the courts and thus to the possibility of having his case reviewed through the judicial procedure established in

[8] See general comment No. 32, para. 22.

[9] See, inter alia, CCPR/C/RWA/CO/4, para. 34; CCPR/C/VEN/CO/4, para. 16; CCPR/C/KGZ/CO/4, para. 20; CAT/C/PAK/CO/1, paras. 10–13; CAT/C/LBN/CO/1, paras. 32 and 35; CAT/C/COL/CO/5, para. 11; CED/C/CUB/CO/1, paras. 19–20; CED/C/COL/CO/1, para. 21; and E/CN.4/Sub.2/2005/9, principle No. 9. Cf., inter alia, European Court of Human Rights, *Ergin v. Turkey (No. 6)* (application No. 47533/99), judgment of 4 May 2006, paras. 47–49, and *Mikhno v. Ukraine* (application No. 32514/12), judgment of 1 September 2016, paras. 164–165; Inter-American Court of Human Rights, *Durand and Ugarte v. Peru*, judgment of 16 August 2010, para. 117, and *Cantoral-Benavides v. Peru*, judgment of 18 August 2000, para. 113; and the African Commission on Human and Peoples' Rights, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, part 4 (B).

[10] Approximately $421,000.

[11] Approximately $21,000.

[12] Approximately $128.

national legislation.[13] The Committee concludes that this part of the communication also reveals a violation of article 14 (1) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the State party violated article 14 (1) of the Covenant in respect of all the authors concerning the trial by Minsk Military Court, and in respect of Mr. Tyvanchuk concerning the refusal of the civil courts to waive the court fees. The Committee reiterates its conclusion that the State party has also violated its obligations under article 1 of the Optional Protocol.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide individuals whose Covenant rights have been violated with an effective remedy in the form of full reparation. Accordingly, the State party is obligated to, inter alia, provide the authors with adequate compensation. In the present case, the State party is under an obligation to, inter alia, quash the decisions of Minsk Military Court dated 26 October 2004 and 5 August 2005, and subsequent court decisions based on them, and provide the authors with a new trial, offering all the guarantees set out in article 14 of the Covenant. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

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[13] See, mutatis mutandis, *Äärelä and Näkkäläjärvi v. Finland* (CCPR/C/73/D/779/1997), para. 7.2.